

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
)  
Amendment of Section 73.622(i), ) MB Docket No. 09-230  
Post-Transition Table of DTV Allotments, )  
Television Broadcast Stations. )  
(Seaford, Delaware) )

ACCEPTED/FILED

JUL - 2 2014

Federal Communications Commission  
Office of the Secretary

To: The Commission

**REPLY TO OPPOSITION TO APPLICATION FOR REVIEW**

PMCM TV, LLC ("PMCM"), by its attorneys and pursuant to Section 1.115(d) of the Commission's Rules, 47 C.F.R. § 1.115(d), hereby replies to the June 17, 2014 Opposition ("Opposition or Opp.") of Western Pacific Broadcast, LLC ("WPB") to PMCM's June 2, 2014 Application for Review ("AFR") in the above captioned proceeding.<sup>1</sup>

<sup>1</sup> *Seaford, Delaware*, Report and Order, 25 FCC Rcd 4466 (Vid. Div. 2010); Memorandum Opinion and Order on Reconsideration, 28 FCC Rcd 1167 (Vid. Div. 2013); and Memorandum Opinion and Order on Further Reconsideration, DA 14-546 (rel. May 1, 2014). The Video Division and the Media Bureau are both referred to herein as the "Bureau." The Opposition for the first time quibbles with PMCM's standing in this public notice and comment rulemaking proceeding. Opp. at n.4. WPB's allegation is baseless. As PMCM has shown, the captioned proceeding is closely intertwined with PMCM's efforts to bring a first licensed television service to Delaware. In fact, on the same day it denied the PMCM Notification in 2009, the FCC launched the captioned proceeding as the first step to rush a new Delaware station onto the air, the technical facilities of which would undoubtedly compete with PMCM's KJWP, relocated to Wilmington. That FCC initiative culminated in agency approval of new commercial television station WMDE at Seaford, Delaware, the authorized technical facilities of which produce the expected cognizable signal contour overlap with KJWP. Under the unique facts of this case, the Seaford allotment was therefore likely to cause economic injury to PMCM through loss of viewership and advertising revenue and PMCM clearly has standing under well-settled precedent. See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). The injury has been compounded with FCC approval of the relocation of WMDE to Dover, separately challenged by PMCM.

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The AFR is premised on the Bureau's failure to properly take into account a significant change in circumstances, namely the issuance by the U.S. Court of Appeals for the District of Columbia Circuit of the decision in *PMCM TV, LLC v. Federal Communications Commission*, 701 F.3d 380 (D.C. Cir. 2012) (the "D.C. Circuit Reversal"), which reversed and remanded the Commission's denial of PMCM's notification rights (the "PMCM Notification") under the second sentence of Section 331(a) of the Communications Act, 47 U.S.C. § 331(a) ("Section 331(a)"), to relocate Station KJWY(TV), Channel 2, from Jackson, Wyoming, to Wilmington, Delaware.<sup>2</sup>

As a threshold matter, PMCM notes that WPB improperly tries to evaluate the AFR using a "rehashing" test commonly applied by the FCC to petitions for reconsideration. Opp. at 1 (i.e., mere repetition of already rejected arguments is not a basis for reconsideration). The issue before the full Commission in an application for review, however, is different – in its most simply expressed form: whether the Bureau got it right below. In the AFR, PMCM made a specific showing as to how the AFR satisfies the requirements set forth in FCC Rule 1.115. No more is needed.

The Opposition labors under various fundamental misapprehensions of the facts and issues presented. First, the relevant test is not whether the Bureau's hasty and ill-considered 2010 Seaford allotment had any bearing on the PMCM Notification (*see* Opp. at 2), but whether the Court's reinstatement *ab initio* of the PMCM Notification has a bearing on the Seaford allotment. Second, WPB's attempt to read Section 331(a) expansively is ineffective and entirely beside the point. The FCC based its unorthodox "on its own motion" decision to make the Seaford allotment solely on a finding that it was thereby filling a VHF Void pursuant to

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<sup>2</sup> *Reallocation of Channel 2 from Jackson, Wyoming to Wilmington, Delaware*, 26 FCC Rcd 13696 (2011), *aff'g* 24 FCC Rcd 14588 (MB 2009).

Section 331(a), not on Section 331(a) somehow authorizing the allotment of *additional* VHF channels to Delaware after that void had been filled. WPB cannot now find solace in an invented alternate ground for the allotment, one on which the Bureau did not rely. Conspicuously, WPB fails even to acknowledge, much less endeavor to explain away, the fact that the Seaford allotment was *entirely* dependent on the VHF Void. Third, WPB inaccurately states that PMCM is arguing that “‘changed circumstances’ *precluded*” PMCM from seeking reconsideration of the Seaford allotment in 2010. Opp. at 2-3 (emphasis added). WPB has it exactly backwards. Changed circumstances (i.e., the D.C. Circuit Reversal in December 2012) *permitted* PMCM to seek reconsideration in 2013, its first opportunity to do so. In other words, PMCM could not launch a supported Section 331(a) challenge to the new Seaford allotment in 2010 because the Bureau had dismissed, as of that time, the PMCM Notification. That all changed with the D.C. Circuit Reversal.

As to substance, WPB does little more than parrot the Bureau’s novel test that PMCM was obligated to seek reconsideration in 2010 on the basis of a prediction or foreseeing of the D.C. Circuit Reversal, and WPB attempts to fault PMCM for not doing so three and a half years ago. But WPB’s paraphrasing of PMCM’s argument on the Bureau’s imprudent new “foreseeability” test is, once again, inaccurate. According to WPB, PMCM’s position would “always” permit otherwise untimely reconsideration requests so long as a petitioner lacked “100% *certainty*” of a Court victory. Opp. at 4 (emphasis in original). That summation misstates PMCM’s position. Changed circumstances of this type do not always exist, but *only* if and when a petitioner *prevails* in Court and succeeds in obtaining reversal of an unlawful agency action. Where, on the other hand, the FCC prevails, circumstances have not changed and reconsideration is not supported. The Commission has never found that a mere prediction of a

winning Court appeal justifies reconsideration. Rather, the FCC has consistently ruled that speculation (here, a predicted appellate victory) is an inadequate basis for reconsideration. Ultimately, the FCC's anticipation of success in Court likely explains why the FCC decided to roll the dice on PMCM's appeal. With the D.C. Circuit reversal, however, the agency lost that bet, producing a number of collateral consequences, including those raised here by PMCM concerning the original Seaford allotment.

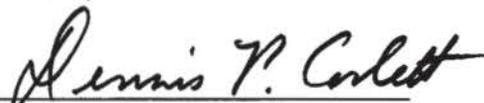
WPB's emphasis on the importance of "finality" of FCC decisions (Opp. at 4 n.12) is completely misplaced. The Seaford allotment decision is decidedly *not* final. That is because the Bureau elected not to take action until 2013 on a timely filed 2010 reconsideration petition relating to the Seaford allotment. By 2013, the 2012 D.C. Circuit had intervened, and the Court's decision constituted a changed circumstance, supporting PMCM's timely filed 2013 petition for further reconsideration. In sum, the Seaford allotment is *not* final, and the years of delay in the processing of the Seaford allotment are not the fault of PMCM.

Finally, the equities cited by WPB (Opp. at 5-6) are irrelevant for several reasons. First, the Bureau's efforts to imprudently rush Seaford through FCC processes during the very same period of time PMCM was challenging the Bureau's dismissal of the PMCM Notification cannot save Seaford now. The FCC should have waited until the Section 331(a) dust relating to the *Wilmington* allotment had settled before moving on with its unilateral *Seaford* plan. In any event, equities do nothing to undermine the APA mandate that unlawful agency action shall be set aside. 5 U.S.C. § 706. Here, the Seaford allotment unlawfully filled a non-existent VHF

Void. It should therefore be overturned by the full Commission on review, relief which is respectfully requested.

Respectfully submitted,

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July 2, 2014

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**CERTIFICATE OF SERVICE**

I, Sharon Krantzman, hereby certify that that on this 2<sup>nd</sup> day of July, 2014, I served copies of the foregoing Reply to Opposition to Petition for Review by causing them to be delivered by first class, postage prepaid U.S. mail to the following:

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